

OLC 81-0295

13 February 1981

MEMORANDUM FOR:

[redacted]  
Special Assistant to the General  
Counsel for Intelligence Community  
Affairs

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[redacted]  
OGC

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[redacted]  
Classification and Review Division, OIS

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FROM:

[redacted]  
Chief, Legislation Division, OLC

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SUBJECT:

H.R. 131

REFERENCES:

- (i) OLC 80-1162/A, 18 August 1980
- (ii) OLC 80-1162/B, 18 August 1980
- (iii) OLC 80-1162/1, 4 June 1980
- (iv) OLC 80-1162/2, 28 August 1980,  
"Defense Views on H.R. 1837"

1. Subject Bill, recently reintroduced by Representative Charles E. Bennett (D, FL), would amend the National Security Act of 1947 to codify the Executive Order on Classification (No. 12065) as well as provide criminal penalties for the unauthorized disclosure of classified information. You will recall that Mr. Bennett introduced the same Bill in the 96th Congress as H.R. 1837, with regard to which we developed an Agency position via referenced correspondence. CIA's views were transmitted to OMB in the form of a views letter (attached), signed by the Legislative Counsel and addressed to the Chairman of the House Armed Services Committee, Melvin Price, who officially requested the same from the CIA. The Agency's official 96th Congress views were never cleared by OMB, nor to our knowledge, any views of any other U.S. department or agency.

2. By letter of 2 February 1981, Chairman Price has once again asked the Agency for its views. Unless there is violent objection to the contrary, this office proposes sending the same views letter to OMB for clearance. Only upon clearance can we subsequently transmit our views to Chairman Price.

OGC

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THE DIRECTOR OF CENTRAL INTELLIGENCE

OLC 80-1162/A |

WASHINGTON, D.C. 20505

Legislative Counsel

18 August 1980

Mr. James M. Frey  
Assistant Director for  
Legislative Reference  
Office of Management and Budget  
Washington, D.C. 20503

Dear Mr. Frey:

Enclosed is a proposed letter to Representative Melvin Price, Chairman of the House Committee on Armed Services expressing the views of the Central Intelligence Agency on H.R. 1837.

Your advice is requested whether there is any objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

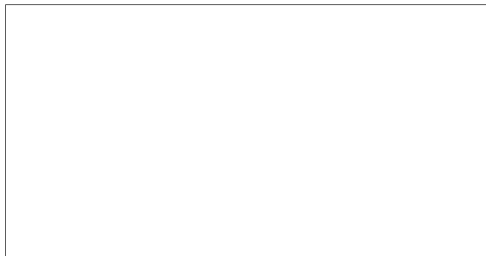
/s/

Frederick P. Hitz

Enclosure

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OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

August 18, 1980

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LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer  
Central Intelligence Agency  
Department of Justice  
National Security Council  
Department of State  
Department of Energy



SUBJECT: Defense proposed report on H.R. 1837, "To amend the National Security Act of 1947 to establish by law procedures for the classification and protection of sensitive information relating to the national security, to provide criminal penalties for unauthorized disclosure of such information, to limit matters that may be classified and impose penalties for unauthorized classification, to provide for declassification, and for other purposes."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for our views is needed no later than September 12, 1980.

Questions should be referred to Tracey Cole (395-4710),  
~~or to~~-----{-----} the legislative analyst in this office.

*Ronald K. Peterson*

RONALD K. PETERSON FOR  
Assistant Director for  
Legislative Reference

Enclosures

cc: Bill Nichols - GC  
Arnie Donahue  
Jim MacRae



DEPARTMENT OF DEFENSE  
OFFICE OF GENERAL COUNSEL  
WASHINGTON, D.C. 20301

11 August 1980

Honorable James T. McIntyre, Jr.  
Director, Office of Management  
and Budget  
Washington, D. C. 20503

Dear Mr. McIntyre:

The views of the Department of Defense have been requested on H. R. 1837, 96th Congress, a bill "To amend the National Security Act of 1947 to establish by law procedures for the classification and protection of sensitive information relating to the national security, to provide criminal penalties for unauthorized disclosure of such information, to limit matters that may be classified and impose penalties for unauthorized classification, to provide for declassification, and for other purposes."

Advice is requested as to whether there is objection to the presentation of the attached report to the Committee.

The Committee has requested that this report be expedited.

Sincerely,

A handwritten signature in cursive script, reading "Werner Windus", is positioned above the typed name.

Werner Windus  
Director  
Legislative Reference Service

Enclosure

Dear Mr. Chairman:

Reference is made to your request for the views of the Department of Defense on H.R. 1837, 96th Congress, 1st Session, a bill "To amend the National Security Act of 1947 to establish by law procedures for the classification and protection of sensitive information relating to the national security, to provide criminal penalties for unauthorized disclosure of such information, to limit matters that may be classified and impose penalties for unauthorized classification, to provide for declassification, and for other purposes."

The bill establishes a security classification system for national security information, designates officials who may classify such information, sets standards for classification and marking of documents, promotes declassification measures, authorizes implementing regulations, and establishes penalties for unauthorized disclosures and improper classification.

The bill provides a legislative base for the security classification system of the Executive Branch which heretofore has operated under Presidential orders. Although

the bill adopts a number of security classification principles of E.O. 12065, "National Security Information," it departs significantly from its provisions in a number of respects. Before the Department of Defense can support its enactment, substantial revision of the legislation is necessary as indicated below.

Section 503 is deficient in that it does not make provision for the use of derivative classification authority as provided by Section 2-1 of E.O. 12065. Without a provision authorizing information to be classified because it incorporates classified information from other documents or material, it will be necessary to expand greatly the number of officials exercising original classification authority. Also, it makes no provision for classification guides as provided in Section 2-201 of E.O. 12065. These guides enable information regarding each classified system, program, plan or project to be identified and marked in a systematic and consistent manner.

Section 504(a) fails to include in its definition of classified information "cryptologic activities, methods, materials and devices." As the unauthorized disclosure of such information is a crime under 18 U.S.C. §798, it should be included in the coverage of the proposed legislation.



Section 504(a)(2) refers to information furnished by a foreign government that has been "designated" as requiring protection. Foreign government information is often furnished in confidence without being physically marked or designated "classified." To avoid any misinterpretation as to the intended meaning of "foreign government information", the following definition should be added to Section 511(5):

"(5) The term 'foreign government information' means information that has been provided to the United States in confidence by, or produced by the United States pursuant to a written joint arrangement requiring confidentiality with, a foreign government or international organization of governments."

This definition would permit Section 504(a)(2) to be revised to read, "foreign government information." It would also lead to a revision of Section 505(c) as follows:

"(c) Foreign government information shall either retain its original classification or be assigned a United

States classification that shall ensure a degree of protection equivalent to that required by the entity that furnished the information."

Comparable changes should also be made in Sections 509(g)(1)(C) and 509(g)(4)(C) if the section prescribing criminal penalties is retained in the bill.

Section 504(c) provides that any official who classifies information in violation of the section shall be considered for disciplinary action. There is no objection to such a provision provided that it is limited to wilfull violations. The word "wilfully" should be added after the word "official" on line 22 of p. 7. On the other hand, Section 510 provides for a criminal penalty for virtually the same offenses. The relationship of the two provisions is unclear. In any event, the Department believes that its system of administrative sanctions is sufficient and that express statutory penalties for improperly classifying a document are unnecessary.

Section 505(a) provides that "each item of classified material" shall be identified by prescribed classification markings. The marking requirements should be limited to

documents and to markings at the time of original classification. Further, the markings should designate the original classification authority (not the name of the official) originating the classification and simply the date the document is originated. In its revised form, Section 505(a) would read:

"Sec. 505(a) Each classified document shall be marked at the time of its original classification to show on its face:

- (1) one of the three classification designations specified in Section 502;
- (2) the identity of the original classification authority;
- (3) the office that originated the classification;
- (4) the date of the document; and
- (5) the date or event for declassification of information that is subject to declassification at a particular time or for review."

Section 505(b) requires that "each item of classified material" indicate on its face or by other means those

portions that are classified and those that are not. "Portion marking" should be required on documents, not hardware.

The section should be revised to read:

"(b) Each classified document shall, by marking or other means, indicate clearly those portions that are classified, with the applicable classification designation, and those portions that are not classified. The President may waive the requirements of the preceding sentence for specified classes of documents or information."

In order to make it clear that classified information may be expressed in some form other than a document such as hardware, tape recordings, computer data, or oral communication, a new Section 505(c) should be added to read as follows:

"All other forms of classified information may be identified in accordance with regulations established pursuant to Section 507."

Section 507(a)(2) should, in turn, be revised to read:

"person coming in contact with classified information have notice of the need to protect such information from unauthorized disclosure."

Section 507(a)(5) would seem to require accountability records for "all classified information." Because of the volume of classified documents, only certain categories of highly classified information should be subject to a register and receipt system. In its revised form, Section 507 (a)(5) would read:

"(5) appropriate records to assure control or accountability for all classified information are established and maintained and that classified information is adequately protected during all transmissions of such information, and"

Section 508 provides that the bill shall not apply to material covered by the Atomic Energy Act. The section should be amended to read:

"Sec. 508. Nothing in this title shall supersede any requirement in the Atomic Energy Act of 1954, as amended, or the regulations issued

thereunder, relating to the handling, protection, classification, downgrading and declassification of 'Restricted Data' or 'Formerly Restricted Data.'"

The Atomic Energy Act does not itself prescribe classification, downgrading and declassification procedures, only the implementing regulations.

Section 509 would make it a crime to knowingly communicate classified information to persons not authorized to receive it. The gradations of the crime would depend upon whether the unauthorized disclosure was to a foreign government, whether the unauthorized disclosure was by a military or civilian employee or a contractor employee, or whether it was simply passed to an unauthorized person by one having no civilian, military or contractual relationship with the U.S. Government. The bill prescribes the defenses to prosecution, the right of the Attorney General to seek an injunction, and provision requiring an in camera inspection by the courts.

While the Department of Defense supports legislation that would broaden the Government's authority to prosecute unauthorized disclosure cases, it recommends that Section

509 be dropped from the bill and considered as separate legislation.

Section 509 raises a number of issues separate and apart from the provisions establishing a security classification system. The following are some of the principal considerations that should be addressed.

- ° There is a serious question whether criminal sanctions should be applied to all unauthorized disclosures, or whether criminal penalties should be confined to particular sensitive categories of information. A review of the Government's prosecutive history suggests that only the most serious breaches of national security are presented to a grand jury.

- ° Although Section 509(c) plainly extends to reporters who knowingly publish classified information, it also provides that the bill is not intended to violate Constitutional rights (free press). The resulting confusion as to the scope of the statute needs to be addressed.

- ° It is a defense to prosecution if the classified information has been publicly disclosed. Such a provision leads to an ever widening body of

unauthorized disclosures, with each public disclosure leading to more detailed disclosures, all of which would go unpunished due to the public nature of the disclosure.

° There is no provision to resolve problems associated with the discovery and use of classified information during the prosecution of the case. An explanation of those problems, and possible legislative solutions, were addressed in the House Intelligence Committee Hearings on "gray mail legislation", H.R. 4736 and H.R. 4745, on August 7, 1979.

Finally, H.R. 1837 makes no provisions for special access programs to control access, distribution, and protection of particularly sensitive information, such as is provided for in Section 4-201 of E.O. 12065. Therefore, the following section should be added as a new Section 504.

#### "SPECIAL ACCESS PROGRAMS

"Sec. 504. Agency heads authorized to originate the classification of information as 'Top Secret' pursuant to Section 503(a)(1) of this title may create special access programs to control access to and distribution and safe-



guarding of particularly sensitive information classified pursuant to this title or prior Executive Orders governing the classification of information in the interest of national security. Such programs may be created or continued only by written direction of such an Agency head, except that for cryptologic information, such programs may be created or continued only by the Secretary of Defense and for foreign intelligence sources and methods, only by the Director of Central Intelligence."

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report concerning H.R. 1837 for the consideration of the Committee.

Sincerely,